DATO' FRANCIS NG TIAN SANG

v.

ALEXANDER WONG SHOON CHOY & ORS

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[CIVIL SUIT NO: 22-136-2000]
1 MARCH 2002

CIVIL PROCEDURE: *Summary judgment - Stay of execution pending appeal - Whether there were special circumstances - Whether appeal, if successful, would be rendered nugatory - Whether there were sufficient grounds for stay to be granted*

This was an appeal by the defendants against the decision of the learned senior assistant registrar dismissing the defendants' application for a stay of summary judgment pending an appeal to the judge in chambers.

Held:

[1] This court would not deprive the plaintiff of the fruits of his litigation until the appeal was determined, unless the defendants could show special circumstances to justify it. The defendants' positions, whether as directors of public listed companies, or, in the third defendant's case, a state assemblyman, could not amount to special circumstances warranting a stay, and neither could the merits of their appeal as a factor standing alone. Regarding the nugatory aspect, the defendants' unsubstantiated bare allegation that the plaintiff was heavily indebted and would be unable to pay should the appeal succeed, was also not a sufficient ground for stay. (pp 305 b & 306 c-f)

[Appeal dismissed.]

Case(s) referred to:

Cebora SNC v. SIP (Industrial Products) Ltd [1976] 1 Lloyd's Rep 271 ***(refd)***
Hong Leong Finance Bhd v. Hon Hoi Weng & Ors [1987] 2 CLJ 227; [1987] CLJ (Rep) 656 ***(not foll)***
Jackson v. Murphy [1887] 4 TLR 92 ***(refd)***
Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 ***(refd)***
Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86 ***(refd)***
MBf Property Services Sdn Bhd v. Madihill Development Sdn Bhd (No 3) [1998] 5 CLJ 461 ***(foll)***
Ng Hee Thoong v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
Overseas Chinese Finance Corporation Bhd lwn. Polite Enterprise Sdn Bhd & Yang Lain [1991] 3 CLJ 2425 ***(foll)***

Perwira Affin Bank Bhd v. Zakaria Ismail & Ors [1998] 2 CLJ 770 ***(foll)***
Perwira Habib Bank (M) Bhd v. Syarikat Johor Tenggara Sdn Bhd & Ors [1989] 2 CLJ 470; [1989] 2 CLJ (Rep) 248 ***(refd)***
Rising Credit Sdn Bhd v. Tan Hock Chan (KL High Court Civil Suit No: 23-2698-86) (unreported) ***(foll)***
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(foll)***
Yeo Hiap Seng v. Australian Food Corp Pte Ltd [1991] 3 MLJ 144 ***(refd)***
YK Fung Securities Sdn Bhd v. Ronald Yeoh Kheng Hian [1989] 2 CLJ 1284; [1989] 2 CLJ (Rep) 664 ***(foll)***

Legislation referred to:
Income Tax Act 1967, ss. 103(1), 106(3)

For the plaintiff - Dr Clarence Edwin (Paramanandan Rajasingam); M/s Zaid Ibrahim & Co
For the defendant - TH Foo (Francis Soh & Ibrahim Hashim); M/s Dass, Jainab & Assocs

Reported by Suresh Nathan

JUDGMENT

Syed Ahmad Helmy JC:

The appeal herein in encl. 88 is against the decision of the senior assistant registrar given on 7 December 2001 dismissing the defendant's application in encl. 83 for stay of the summary judgment dated 29 October 2001 pending appeal to the judge in chambers. In dismissing the application for stay the senior assistant registrar imposed a condition that the judgment sum be kept in an interest-bearing account maintained by the plaintiffs solicitors pending the disposal of the defendant's appeal against the summary judgment.

The evidence regulating the stay application in encl. 83 are to be found in the affidavit of the 2nd defendant in encl. 83A filed in support of the application on behalf of all three defendants and the affidavit in opposition of the plaintiff in encl. 87.

The principal thrust of the defendant's application for stay is founded on their contention that in an application for stay of a summary judgment the defendants' need not prove special circumstances but only a demonstration that the probabilities are in favour of the appeal being allowed and relies heavily on the High Court decision of VC George J (as he then was) in *Hong Leong Finance Bhd v. Hon Hoi Weng & Ors* [1987] 2 CLJ 227; [1987] CLJ (Rep) 656 and the Supreme Court decision of Edgar Joseph Jr FCJ in *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701.

Further, it is the defendant's contention that there are special circumstances which merits the courts discretion in ordering a stay. The special circumstances

relied upon by the defendants are that they are all directors of a public listed company PanGlobal Berhad which is presently undergoing restructuring which may adversely affect their position and cause untold losses and hardship and cannot be compensated by damages if a stay is not granted and particularly in respect of the 3rd defendant who is a state assemblyman for Limbang, Sarawak he may lose his seat if execution by way of bankruptcy proceedings is proceeded upon by plaintiff.

Coming to the defendant's first contention on the applicability of different considerations of stay principles for summary judgment cases it is only appropriate to allude to the facts of the two cases referred to. *Hong Leong Finance Berhad v. Hon Hoi Weng & Ors* [1987] 2 CLJ 227; ([1987] CLJ (Rep)) 656 relates to a claim on an indemnity furnished by the defendant to the plaintiff to cover the loss the plaintiff may suffer arising out of a hire-purchase agreement, and upon 4th defendant's application to stay the summary judgment entered VC George J (as his Lordship then was) at p. 229 (p. 658) stated the following oft quoted passage:

> In respect of applications for stay pending appeal, a distinction has to be drawn between a matter that was decided upon after full trial and enquiry and one summarily arrived at by a Senior Assistant Registrar. In the former case the general rule no doubt continues to be that special circumstances have to be shown (there could no doubt be exceptions to the general rule). But in the latter it seems to me that demonstration that the probabilities are in favour of the appeal being allowed should normally be sufficient for the court to exercise its discretion to order a stay pending appeal.

A close scrutiny of the facts reveals that a weighty factor taken into consideration by his Lordship in arriving at the conclusion he did was the fact the 4th defendant's liability was only by way of indemnity over the hire-purchase agreement executed by the principal debtors which the court had earlier ruled was laced with triable issues disentitling the plaintiff to summary judgment against the principal debtors. By reason thereof the probability of the 4th defendant succeeding in the appeal becomes evident and hence the rationale behind the decision.

Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 was a case involving summary judgment against a tax payer pursuant to two notices of assessment. The appeal to the Supreme Court was against the order of the High Court ordering a limited stay against the summary judgment.

The *ratio* of the Supreme Court decision in my view, was that ss. 103(1) and 106(3) Income Tax Act 1967 do not prohibit a court from exercising its inherent powers of granting stay in tax cases and that the appellate court would only interfere with the lower court judges exercise of discretion to grant stay

in exceptional circumstances and the fact that the appellate court might have exercised the discretion differently would not constitute sufficient ground for overturning the judge's decision to grant the limited stay.

I have scrutinised the Supreme Court judgment of Edgar Joseph Jr FCJ and nowhere does the Supreme Court decision endorse the views expressed by VC George J in *Hong Leong Finance Bhd v. Hon Hoi Weng & Ors* [1987] 2 CLJ 227; [1987] CLJ (Rep) 656 in respect of the applicability of different consideration of stay principles for summary judgment cases. In point of fact the paragraph relating to the agreement with the views of VC George J was the view of the High Court judge which the Supreme Court narrated.

Again a close scrutiny of the passage of the Supreme Court judge purportedly agreeing with the views expressed by VC George J would reveal that its endorsement is only to that part of the decision relating to special circumstances and not the distinction between summary judgment and full trial. This becomes evident when immediately after endorsing the views of VC George J the learned Supreme Court judge went into the special circumstances phraseology as defined by Raja Azlan Shah J (as His Majesty then was) in *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86.

In essence the *ratio* of the Supreme Court decision is a reaffirmation of the special circumstances approach rather than endorsing the distinction of approach and application of stay principles between summary judgment and full trial cases.

At the other end of the spectrum there are authorities with contrary views namely there is no difference in the applicable stay principles between summary judgment and full trial cases in that the well established test of special circumstances is the applicable test. The authorities in support of this view are *Rising Credit Sdn Bhd v. Tan Hock Chan* (KL High Court Civil Suit No. (23-2698-86)) and *Overseas Chinese Finance Corporation Bhd lwn. Polite Enterprise Sdn Bhd & Yang Lain* [1991] 3 CLJ 2425.

In *Rising Credit Sdn Bhd v. Tan Hock Chan* the learned judge Chan J (as he then was) in disagreeing with VC George J stated:

> With respect, I am unable to agree with my brother George J in *Hong Leong Finance v. Hon Hoi Weng* (CSC 294 of 1983). The Court's inherent jurisdiction to stay proceedings has to be exercised only on grounds which are relevant to stay and does not extend to grounds which are probably matters of defence on law or relief in equity; see *Trustees Ltd v. Darwen* [1969] 1 All ER 271; 17 *Halsbury's Laws of England*, 4th Edn. para 451.

Abdul Hamid Mohamed JC (as he then was) in adopting the approach adopted by Chan J in *Rising Credit Sdn Bhd* case and disagreeing with VC George in *Hong Leong Finance* case emphasised that the approach to be adopted is that as laid down by Hashim Yeop A Sani J (as his Lordship then was) in *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406 in that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it.

In ruling that the test of special circumstances is the applicable test for both summary judgment cases and full trial cases the learned judge stated:

> Saya tidak fikir untuk tujuan ini patut diadakan perbezaan di antara penghakiman terus dan penghakiman selepas perbicaraan sepenuhnya. Kedua-duanya adalah penghakiman muktamad. Kita sedia maklum bahawa penghakiman terus hanya diberi dalam kes yang jelas, di mana tidak ada persoalan-persoalan yang patut dibicarakan. la tidak patut dianggap sebagai mempunyai nilai yang kurang. Setiap plaintiff yang berjaya memuaskan Mahkamah bahawa pembelaan tidak membangkitkan apa-apa persoalan yang patut dibicarakan seharusnya boleh menikmati hasil penghakiman itu sama seperti seorang plaintiff yang mendapat penghakiman selepas perbicaraan, melainkan jika terdapat keadaan-keadaan yang tertentu (special circumstances).

I am in agreement and endorse the views expressed by his Lordship Abdul Hamid Mohamad JC (as he then was). There is no valid justification for such a distinction to be made. On the contrary the very fact that the judgment is summarily granted must by itself be justification enough of the overwhelming evidence that obviates the necessity of a full trial and hence it would be contrary to justice to deprive the successful litigant to savour the fruits of his judgment.

In this connection the nature of the claim is a very relevant and crucial factor in negativing such a distinction. The nature of the claim herein is principally based on dishonoured cheques issued by the defendants to the plaintiff. The claim as such falls within a special class of claims under bills of exchange and it is trite law that dishonoured cheques are bills of exchange which are treated as cash – *Jackson v. Murphy* [1887] 4 TLR 92 where the court stated:

> We have repeatedly said in this Court that a bill of exchange or a promissory note is to be treated as cash. It is to be honoured unless there is some good reason to the contrary.

It is also trite law that in an application for summary judgment on the proceeds of dishonoured cheques, the plaintiff is entitled to summary judgment for the amount claimed without a stay of execution – *Yeo Hiap Seng v. Australian Food Corp Pte Ltd* [1991] 3 MLJ 144; *Cebora SNC v. SIP (Industrial*

Products) Ltd [1976] 1 Lloyd's Rep 271 and *Perwira Habib Bank (M) Bhd v. Syarikat Johor Tenggara Sdn Bhd & Ors* [1989] 2 CLJ 470; [1989] 2 CLJ (Rep) 248.

Since the requirement of special circumstances is the relevant test, I shall venture to ascertain whether the defendants have fulfilled this requirement. The special circumstances adverted to by the defendants are their status as directors in public listed companies and the 3rd defendant's position as state assemblyman would be irreparably harmed if stay is not granted. Further they advanced the argument of merits in their appeal and the nugatory element as special circumstances.

On their status as directors of public listed companies and 3rd defendants position as state assemblyman being affected, sadly, it cannot fall within the scope of special circumstances. The defendants position whether as directors of public listed company or the 3rd defendant as a state assemblyman cannot amount to special circumstances warranting a stay – see *MBf Property Services Sdn Bhd v. Madihill Development Sdn Bhd (No 3)* [1998] 5 CLJ 461 and *Perwira Affin Bank Bhd v. Zakaria Ismail & Ors* [1998] 2 CLJ 770.

Again merits of appeal as a factor standing alone cannot amount to special circumstances – *Perwira Affin Bank Bhd v. Zakaria Ismail & Ors* [1998] 2 CLJ 770; *MBf Property Services Sdn Bhd v. Madihill Development Sdn Bhd (No 3)* [1998] 5 CLJ 461 where the court expressly stated that "neither merits nor appeal nor the correctness or otherwise of judgments are special circumstances" for a stay of execution.

On the nugatory aspect, regretfully there is only a bare allegation of the defendants unsupported by any evidence. Mere averments that a plaintiff is heavily indebted and will be unable to pay back the judgment should the appeal succeed is not a sufficient ground for stay – see *YK Fung Securities Sdn Bhd v. Ronald Yeoh Kheng Hian* [1989] 2 CLJ 1284; [1989] 2 CLJ (Rep) 664.

On the contrary the plaintiffs averment in para. 7 of his affidavit in encl. 87 of being of substantial means was never denied by defendant and hence according to the principle established in *Ng Hee Thoong v. Public Bank Bhd* [1995] 1 CLJ 609 is deemed to be admitted.

In any event the nugatory argument cannot be sustained for the reason that the judgment sum is by the order of the senior assistant registrar to be kept in any interest bearing account maintained by plaintiffs solicitors pending the disposal of the defendant's appeal – in short the judgment sum is not in jeopardy.

On the contrary if execution on the judgment is stayed it would be more detrimental to the plaintiff as in the light of the several pending proceedings and also a bankruptcy petition against one of the defendants the plaintiff may not be able to recoup the fruits of his judgment.

For the reasons adumbrated above I accordingly dismiss the defendants' appeal in encl. 88 with costs.